

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH  
NORTHERN DIVISION

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JOSE JUAN FONSECA RIOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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ORDER CONSTRUING  
PETITIONER'S *PRO SE* CRIMINAL  
MOTION AS A MOTION TO  
VACATE, SET ASIDE OR  
CORRECT SENTENCE, PURSUANT  
TO 28 U.S.C. § 2255, AND  
ESTABLISHING BRIEFING  
SCHEDULE

Civil Case No. 1:07-CV-54 TS  
Criminal Case No. 1:03-CR-71 TS<sup>1</sup>

This matter is before the Court on a *pro se* filing with the Court in the underlying criminal case, Case No. 1:03-CR-71 TS. In that case, Petitioner submitted to the Court a

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<sup>1</sup> This case was originally assigned to Judge Winder, but was transferred to the undersigned Judge on June 27, 2006. Docket No. 22.

document entitled “Notice and Motion for Reconsideration and For Downward Departure; Defendant’s Position Regarding Resentencing; Memorandum of Points and Legal Authorities.”<sup>2</sup>

### DISCUSSION

In construing a motion filed in a criminal case which requests relief as outlined in 28 U.S.C. § 2255, the Court is required to make Defendant “aware of the risk associated with recharacterization” as a § 2255 motion, and obtain Defendant’s assent or, the court must “conclude[] that the [defendant’s] motion can only be considered under § 2255 and offer[] the movant the opportunity to withdraw the motion rather than have it so recharacterized.”<sup>3</sup> Defendant must be given an “opportunity to contest the recharacterization, or to withdraw or amend the motion.”<sup>4</sup>

Having considered the filings and the relief requested therein – that expressly covered by § 2255 – the Court hereby construes Petitioner’s Motion as a Petition under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (hereinafter Petitioner’s § 2255 Motion). The Court has opened a new civil case, Case No. 1:07-CV-54 TS, for disposition of this matter.<sup>5</sup> The parties are instructed to file all further pleadings and documents in this case under the above-referenced civil case number.

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<sup>2</sup> Docket Nos. 18 and 20 in Case No. 1:03-CR-71 TS.

<sup>3</sup> *United States v. Nelson*, 463 F.3d 1145, 1149 (10<sup>th</sup> Cir. 2006).

<sup>4</sup> *Castro v. United States*, 540 U.S. 375, 381 (2003).

<sup>5</sup> The Court has termed Petitioner’s Motion filed in the criminal case.

The Court will grant Petitioner until May 11, 2007, to file a memorandum in support of his § 2255 Motion, objecting to the Court's recharacterization of his criminal Motion as a § 2255 Motion, or requesting the withdrawal thereof. Further, the Clerk of Court will mail a § 2255 pleading packet to Petitioner with the above-captioned case number. If Petitioner chooses to utilize this packet, it shall also be filed by May 11, 2007. The government shall file its response by June 1, 2007.

The Court directs the parties to specifically address in their memoranda the issue of the timeliness (or lack thereof) of Petitioner's Motion, in accordance with the statute of limitations applicable herein, set forth by 28 U.S.C. § 2255(1).

#### CONCLUSION

Based upon the above, it is hereby

ORDERED that Petitioner's *pro se* criminal motion (Docket Nos. 18 and 20 in Case No. 1:03-CR-71 TS) is construed as a Petition under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. All future pleadings related thereto shall be filed in Case No. 1:07-CV-54 TS. It is further

ORDERED that Petitioner shall have until May 11, 2007, to file a memorandum in support of his § 2255 Petition, objecting to this recharacterization, or requesting the withdrawal thereof. The government shall have until June 1, 2007, to file a response.

SO ORDERED.

DATED this 12th day of April, 2007.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Stewart", is written over a horizontal line.

TED STEWART  
United States District Judge